Petition

81-1603

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NO.

in the
Supreme Court
of the
United States

CARLOS HUMBERTO SALAZAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Sixth Amendment guarantee of effective assistance of counsel and the Fifth Amendment right to due process of law were violated when the District Court denied Petitioner's Motion for Continuance, thus allowing Petitioner's newly retained counsel only two days to prepare a defense in a complex, multi-defendant case, although the Court had granted the Petitioner's request to substitute counsel after the Court became aware that Petitioner's first counsel was incompetent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION OF THE COURT BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE PETITION 15

I. The denial of the Petitioner's motion for a continuance prevented his counsel from effectively preparing for trial by only allowing two days for such preparation in a multi-defendant, multi-count case, thus raising important Fifth and Sixth Amendment questions concerning a conflict in the circuits and a particular need for uniform standards 15

CONCLUSION 22

APPENDICES:

A. *United States v. Jesus Jimenez-Diaz and Carlos Humberto Salazar*, No. 80-5176 (Fifth Circuit, October 19, 1981) (Opinion) ..... App. 1

TABLE OF CONTENTS (Continued)

Page

B. *Carlos Humberto Salazar v. United States*, No. 80-5176 (Fifth Circuit, November 30, 1981) (Order Denying Petition for Rehearing) ..... App. 16

TABLE OF AUTHORITIES

Page

Cuyler v. Sullivan,
____ U.S. __, 100 S.Ct. 1708, 1716 (1980) 16, 17

Erelford v. United States,
288 F.2d 298 (9th Cir. 1961) 20

Gandy v. Alabama,
569 F.2d 1318 (5th Cir. 1978) 20

Gideon v. Wainwright,
372 U.S. 335 (1963) 15

Powell v. Alabama,
287 U.S. 45 (1932) 16, 20

Slappy v. Morris,
649 F.2d 718, 720 (9th Cir. en banc 1981) 19, 21

Ungar v. Sarafite,
376 U.S. 535, 575, 589 (1964) 16, 18

United States v. Beaty,
465 F.2d 1376, 1378-79 (9th Cir. 1972) 19

United States v. Burton,
584 F.2d 485, 489-91 (D.C. Cir. 1978) *cert denied* 439 U.S. 1069 (1979) 18

United States v. Gates,
557 F.2d 1086, 1088 (5th Cir. 1977) *cert denied* 434 U.S. 1017 (1978) 18

TABLE OF AUTHORITIES (Continued)

Page

United States v. King,
664 F.2d 1171 (10th Cir. 1981) 20

United States v. Lustig,
555 F.2d 737, 744 (9th Cir. 1977) *cert denied* 434 U.S. 1045 (1978) 19

United States v. Phifer,
511 F.2d 960, 962 (4th Cir. 1975) 19

United States v. Pinto,
503 F.2d 718, 722, 723 (2d Cir. 1974) 19

United States v. Seale,
461 F.2d 345 (7th Cir. 1972) 20

United States v. Valdez,
418 F.2d 363, 365 (5th Cir. 1969) 18

United States v. White,
529 F.2d 1390, 1393 (8th Cir. 1976) 19

Constitutional Provisions:

Amendment IV, United States Constitution 2

Amendment V, United States Constitution 2, 15

Amendment VI, United States Constitution . 3, 15, 16, 17, 18, 19, 20

TABLE OF AUTHORITIES (Continued)

Page

Rules and Regulations:

Rule 20, Rules of the United States Supreme Court 2

28 U.S.C. §1254(1) 2

NO.

in the Supreme Court of the United States

October Term, 1981

CARLOS HUMBERTO SALAZAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, CARLOS HUMBERTO SALAZAR, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 19, 1981, rehearing denied on November 30, 1981.

OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 659 F.2d 562 (5th Cir. 1981). The Order denying rehearing was filed on November 30, 1981.

JURISDICTION

The Judgment of the Court of Appeals affirming the Judgment of the United States District Court was entered on October 19th, 1981. The Petition for Rehearing was denied on November 30, 1981. This Petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment IV, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, Constitution of the United States:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecution, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A three-count indictment returned in the Middle District of Florida on December 17, 1979, charged the Petitioner and two co-defendants with possession with intent to distribute cocaine, importation of cocaine, and conspiracy to import and to possess with the intent to distribute cocaine. On October 25, 1979, H. Lee Bauman filed a notice of appearance on behalf of the Petitioner. (SR. 9). In the months that followed, Petitioner's counsel remained totally inactive, while counsel for co-defendant Diaz filed a number of defensive motions and began to prepare for trial. Three months later, on January 7, 1980, Petitioner's counsel filed his first and only pretrial motion, a motion to adopt the motions already filed on behalf of a codefendant. (R. 59).[1] On January 14, 1980, Petitioner's counsel advised him that he was unprepared to mount any defense on behalf of the Petitioner, and he would only assist him in entering a guilty plea. Upon learning of this, the Petitioner insisted upon his

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[1]From the date that Mr. Bauman filed his appearance, his actions on behalf of the Petitioner amounted to nothing. He did not appear on behalf of the Petitioner at his arraignment (SR. 12), filed only a single motion, and made no attempt to argue any motion on behalf of the Petitioner. The one motion that he did file was, in fact, only a motion to adopt four motions previously filed by counsel for co-defendant Diaz. (R. 59). All the Diaz motions had been denied at the time Bauman sought to adopt them. (R. 57-58). In seeking to adopt these motions, Bauman was adopting the Diaz motion for severance. This severance motion stated as one of its grounds *the defenses of the defendants in this cause are in conflict and antagonistic.* The Petitioner not only adopted all the Diaz motions and arguments (R. 29-32), he also adopted all the testimony presented at lengthy hearings on that Diaz motion to suppress evidence, a hearing which he did not even bother to attend. (SR. 5).

constitutional right of trial by jury and made his feelings known to the Court. (SR. 16, 17).

In a lengthy and revealing hearing, the Court learned that the Petitioner's brief meeting with his counsel on the very day of his trial, was only the second such meeting Petitioner had since he retained Mr. Bauman three months previously. The Court further learned that in the first of these two meetings very little, if anything, had been accomplished.

The Petitioner:

> . . . all we did was read a paper and that was it. I was not told one word about anything. (SR. 21).

Mr. Bauman:

> Mr. Salazar came into my office and we did go over this statement that was going to be used by the government, ok, that was given by Mr. Hudson . . . I started to make—trying to get hold of Mr. Salazar to sit down for a conference, but—pretrial conference. Ok?
>
> Now, yesterday, for some reason, I found out Mr. Salazar and his wife were in Tampa. So I came here this morning. I saw Mr. Salazar in the hall. I had every intention of going over this whole thing over the weekend with Mr. Salazar . . . (SR. 36, 37).

Petitioner's attorney had not met with the Petitioner or attempted to prepare a defense; all he did was tell the Petitioner that his only option was to plead guilty. This last minute revelation was particularly shocking

to the Petitioner as the day that he found out that this was to be his counsel's strategy he also learned, for the first time, that he was to go to trial that very day.

Mr. Salazar:

No, sir, Judge, I was told that this—today was the hearing. I was not told that this was a trial. (SR. 12).

Mr. Salazar:

I read a paper at his office, and if we said three words, he didn't say nothing to me about the case, nothing about the *date*, nothing at all.

The Court:

How did you happen to be here today? Here you are.

Mr. Salazar:

I was told by my employer that I had to go to court today, the 14th. (SR. 32).

Mr. Bauman:

When did you find out there was a trial today?

Mr. Salazar:

I found out there was a trial today when he told me in the hall. When I came up and asked him and—.

Mr. Bauman:

How about when Hudson was severed from you and trial dates were set?

Mr. Salazar:

I didn't even know that. I thought all three of us were going to be here today. (SR. 19).

The Court:

Did you ever tell him there was going to be a jury trial and the date of the trial?

Mr. Bauman:

The date of the trial?

The Court:

Yes, sir.

Mr. Bauman:

Probably not directly. (SR. 19).

So on the day set for trial the Petitioner first learned not only that he was going to trial but that he had to plead guilty.

Mr. Salazar:

And I have no chance, and I'm not guilty, you know, I'm not going to plead guilty to something.

The Court:

Nobody is going to be—.

Mr. Salazar:

And that is almost exactly what he asked me to do, that I'm going to walk in the courtroom, you know. Maybe I'm not going to walk out, you know, that I'm going to go to jail. That is exactly what he is telling me in the hall. (SR. 22).

Mr. Salazar:

It's not that, Judge. It's not that I didn't know I was going to trial. I wasn't told I was going to trial. I haven't reviewed the case at all, haven't talked anything about this case with Mr. Bauman. I have no—you know, nothing at all.

Mr. Salazar:

He hasn't, you know, he hasn't told me anything. I have not told him anything. We haven't discussed anything at all about this case. I did not know that this was a trial. (SR. 29).

Mr. Bauman denied that he advised the Petitioner to plead guilty and excused his failure to confer with his client by shifting the blame to others.

Mr. Bauman:

The attorney-client communication situation has not been—has been less than I would have wanted.

The Court:

Why?

Mr. Bauman:

Basically, because information was being relayed through another attorney and we were preparing this case.

The Court:

Whose responsibility was that?

Mr. Bauman:

> Well, it was my responsibility, Your Honor, actually to convey information, but I know that the Defendant. Mr. Salazar, had been in communication with Mr. Gonzalez,[2] and he was keeping him advised, as well, as how things progressed. (SR. 16, 17).

Mr. Salazar:

> . . . I've never spoken to Mr. Gonzalez over the telephone, like he stated. Never.

Mr. Bauman:

> How about Vinnie?

Mr. Salazar:

> I have never spoken to Mr. Lazzara.

The Court:

> He hasn't been in contact with neither of you? (Addressed to Gonzalez and Lazzara, who were present at the time).

Mr. Bauman:

> I am mistaken. (SR. 31).

The Petitioner summed up his feeling in saying:

> I am not satisfied with—you know,—the word is *inadequate*, yes. His attitude towards the case, . . . (SR. 30). (Emphasis added).

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[2]Anthony Gonzalez, who represented the co-defendant Diaz, had his office in Tampa. The Petitioner lived and worked in Miami, the same town in which his attorney, Mr. Bauman, had his office.

Mr. Salazar:

I am not asking that. I'm asking for somebody that is, at least, going to do something for me. You know what I mean?

The Court drew the following conclusions:

The Court:

It is obvious he is dissatisfied with—I won't say about representation. He's dissatisfied. Mr. Salazar is concerned, he says. I don't know. He's got a lot to be concerned about, I would think. He is charged with some serious offenses and if he wants a lawyer who is going to come in and tell him, 'you are going to be convicted' he may have a hard time. Lawyers aren't supposed to tell you, one way or another. (SR. 26).

The Court:

This is about the second or third time I've had this situation with Miami lawyers—.

Mr. Bauman:

Well, I can't speak for other Miami lawyers.

The Court:

No, but you can speak for yourself.

Mr. Bauman:

Yes, sir. (SR. 27).

The Court:

Mr. Bauman, is this the way you usually represent a client charged with a serious crime, that you have one *ten minute conference with him?* (Emphasis added).

Mr. Bauman:

One ten minute conference?

The Court:

That's what he says. He said he met with you one day and you had a paper there and you were there about three minutes and that since then, the only thing he has heard about this is from his employer.

Mr. Bauman:

Ok. The easiest way for me to contact him was through his employer, number one. Number two—.

The Court:

I think we'd better not go into this further but—on the record. I have you—you are here at 1:30 today, too.

Mr. Bauman:

Certainly.

The Court:

I want to serve notice on you *I am going to be in touch with you again about your professional conduct* in this case, Mr. Bauman. Do you understand? (SR. 35). (Emphasis added).

Though Mr. Bauman had demonstrated representation of a type which caused the Court to question his professional conduct, and although the Court acknowledged that this was a serious crime, it granted a continuance only until the following Thursday morning, January 17th. During this three day period, the Petitioner had to retain new counsel and this new counsel had to prepare a defense. (SR. 49).

On January 15th, 1980, Petitioner's newly retained counsel notified the Court of his appearance on behalf of SALAZAR and requested a continuance of thirteen days so that he might have adequate time to prepare a defense. Subsequently, new counsel filed a written motion for continuance citing as grounds that:

1. SALAZAR's prior counsel, Mr. Bauman had admitted he was unprepared to proceed to trial.

2. New counsel was told on Tuesday, January 15th, the day he was retained, that the Petitioner's trial was now scheduled for Thursday, January 17th.

3. Counsel advised the Court that he would do all he could to prepare for trial, but he had also advised the trial judge that he intended to file a formal motion for continuance.

4. Counsel had talked with the Defendant and obtained all that the Defendant knew about the case, but he found, on obtaining prior counsel's file, that Mr. Bauman had apparently not investigated the case in any fashion. This lack of investigation was indicated by the absence of any memorandum or note, and the presence

of only one motion, which is the motion to adopt the pleadings of the co-defendant.

5. Counsel did not know what witnesses the Government intended to call, other than those described in the complaint. The circumstances made it impossible for him to begin to prepare a defense as he was unaware of the witnesses that he would need to call at trial due to his lack of knowledge about the Government's case.

6. Counsel had just learned that JAMES HUDSON, a former co-defendant would now testify for the Government.

7. An examination of Mr. Bauman's files show that the Petitioner had thus far received ineffective assistance of counsel as Bauman conducted no pretrial preparation. New counsel tried to remedy those omissions.

8. Defendant was requesting a continuance, not as a defense strategy, not just to delay the trial, but only because he wished to prepare for trial, and to be represented by an effective counsel. (R. 61-64).

On January 17th, 1980, this motion for continuance was denied.

During the trial that followed, the results of the trial court's refusal to allow Defendant's newly retained counsel adequate time to prepare was evidence by the following:

1. Counsel's inability to call a single witness to testify on behalf of the Defendant.

2. Counsel's inability to argue the applicable case law supporting his contention that Rule 11 supported Defendant's Motion to Suppress. (TR.,V.1, pp. 251, 251).

3. Counsel's ability to be prepared to make an opening statement. (TR., V.1, p. 14).

4. Counsel's need to ask in focused questions of government witnesses.

REASON FOR GRANTING PETITION

THE DENIAL OF THE PETITIONER'S MOTION FOR A CONTINUANCE PREVENTED HIS COUNSEL FROM EFFECTIVELY PREPARING FOR TRIAL BY ONLY ALLOWING TWO DAYS FOR SUCH PREPARATION IN A MULTI-DEFENDANT, MULTI-COUNT CASE, THUS RAISING IMPORTANT FIFTH AND SIXTH AMENDMENT QUESTIONS CONCERNING A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

In 1963 this Court held, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the right to counsel is "fundamental and essential to a fair trial". This case, simply stated, raises the question of whether a court must allow a defendant reasonable time in which to consult with competent counsel in order to assure effective representation as mandated by the Sixth Amendment.

As early as 1932, this Court stated:

> "It is true that great, unexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time and delays incident to disposition of motion or motions for a new trial and hearings upon appeal have come, in many cases, to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching

> that result, a defendant charged with a serious crime must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. *Powell v. State of Alabama*, 287 U.S. 45, 59 (1932).

In an effort to strike a balance between the sometimes competing interest of society in the prompt disposition of a criminal case, and the right of a defendant to be represented by counsel who has had adequate time to prepare, this Court has stated:

> " . . . It is not every denial of a request for more time that violates due process, even if the party fails to offer evidence or is compelled to defend without counsel. Contrarywise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." (Citations ommitted). *Ungar v. Sarafite*, 376 U.S. 535, 589 (1964). (Emphasis added).

Though the case law in some of the federal circuit courts has recognized separate and distinct standards for retained and court-appointed counsel under the Sixth Amendment, this Court has recently held that the Sixth Amendment provides "that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel." *Cuyler v. Sullivan*, ____U.S.____, 100 S.Ct. 1708, 1716 (1980).

In the instant case, the Petitioner, upon learning that the counsel whom he had retained had done absolutely

nothing in the way of preparing a defense, immediately asked to address the Court. (SR. P. 12). As he was unwilling to plead guilty, he then sought and obtained the Court's permission to retain new counsel who would at least attempt to represent him. His newly retained counsel sought to do that which his previously retained counsel had not, prepare Salazar's defense to the charges. Petitioner's uninformed decision to initially retain counsel,[1] who turned out to be ineffective, is by no means new, as had been pointed out by this Court:

> We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment, which stands for little in the often uninformed decision to retain a particular lawyer, should reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in a defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Cuyler v. Sullivan, supra,* at 100 S.Ct. 1716. (Emphasis added).

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[1]The trial court's opinion of Salazar's initial attorney's competence, Mr. Bauman, was made crystal clear.

> The Court:
> I want to serve notice on you I am going to be in touch with you again about your professional conduct in this case, Mr. Bauman. Do you understand? (SR. 35).

The Petitioner's newly retained counsel's immediate reaction upon reviewing the record and discovering that previous counsel had done absolutely nothing to prepare for trial was to file a motion requesting a continuance of eleven days. (R. 61-64). The trial judge's response to defense counsel's reasonable request for eleven days within which to prepare for trial was: "We are going to try this case, and we're going to start it in about five minutes." (TR. V.1, p. 20).

The issue presented is whether the request for a continuance was made in good faith, and was essential to the fair administration of justice and consistent with the goals of the Sixth Amendment. At present, the absence of a uniform standard for evaluating the prejudice to a defendant forced to trial with counsel whose effectiveness is materially impaired by lack of preparation has fostered inconsistent results and improper and unsupported judicial speculation concerning the effect of different counsel in the outcome of a trial.

The Fifth Circuit, in *United States v. Valdez*, 418 F.2d 363, 365, (5th Cir. 1969) has held that the denial of a continuance, by itself, does not amount to a denial of effective assistance of counsel. Numerous courts have held that in some circumstances the court may constitutionally deny a continuance even when that denial results in the defendant not being represented in trial. Usually this occurs when the defendant engages in a course of conduct which is dilatory and hinders the efficient administration of justice. See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *United States v. Burton*, 584 F.2d 485, 489-91 (D.C. Circuit 1978), cert. denied, 439 U.S. 1069 (1979); *United States v. Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977), cert. denied 434 U.S. 1017

(1978); *United States v. Lustig*, 555 F.2d 737, 744 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States v. White*, 529 F.2d 1390, 1393 (8th Cir. 1976); *United States v. Phifer*, 511 F.2d 960, 962 (4th Cir. 1975); *United States v. Pinto*, 503 F.2d 718, 722, 723 (2nd Cir. 1974); *United States v. Beaty*, 465 F.2d 1376, 1378-79 (9th Cir. 1972).

When the Sixth Amendment right to counsel comes into conflict with the trial court's discretionary power to deny continuances, the appellate courts have applied a balancing test of several factors to determine if the trial judge's action was fair and reasonable. Different circuits apply different weights to a different number of factors. Some of these factors are: (a) the inconvenience to the witnesses, court, counsel, and parties; (b) have other continuances been granted; (c) is the request for delay based on a legitimate reason; (d) is the delay the defendant's fault; (e) will the denial of a continuance prejudice the defendant; (f) is the length of the continuance requested a reasonable one as compared to the needs specified; (g) was the request made in a timely fashion; (h) time available; (i) did the accused play a role in shortening effective preparation time; (j) the degree of complexity of the case; and (k) the availability of discovery from the prosecution and assistance given by any previous counsel.

Though there is a substantial disagreement over which factors should be used and how, surely the courts are in agreement that "the right to counsel includes more than just the right to representation by competent counsel at trial. This right would be without substance if it did not include the right to a meaningful attorney/client relationship." *Slappy v. Morris*, 649 F.2d

718, 720 (9th Cir. en banc 1981). As it takes time to develop this relationship as well as the other tasks required to prepare for trial, several courts have found constitutional defects in a trial court's failure to grant a continuance when one is necessary to guarantee effective assistance of counsel. See *Erelford v. United States*, 288 F.2d 298 (9th Cir. 1961); *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978); *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

If the right to counsel, whether retained or court-appointed, is to have real meaning, that right must include adequate time to prepare a defense as well as to establish a working attorney/client relationship.[2] This relationship is "so important to the right to counsel, that it must be accorded weight in a trial judge's decision

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[2]The 10th Circuit has been particularly sensitive to those rights provided by the Sixth Amendment. Recently, it cited this Court's holding in *Powell v. Alabama*, 287 U.S. 45 (1932) as standing for the proposition that a court's denial of a defendant's Motion for Continuance was a denial of effective assistance of counsel in that it did not allow defense counsel adequate time for preparation.

> "Inadequate case preparation can jeopardize an accused's right to effective assistance of counsel. See *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. at 65. Although frequently the result of a slothful lawyer, inadequate preparation can also be caused by an unreasonable time constraint imposed by a trial court."

United States v. King, 664 F.2d 1171 (10th Cir. 1981).

While the 10th Circuit in *King* held that the 12 days which defense counsel was given for preparation was *inadequate*, the Fifth Circuit, in the instant case, obviously disagrees as it upheld an allowance of only 2 days.

as to whether to grant a continuance." *Slappy v. Morris*, 649 F.2d 718 (9th Cir. en banc 1981).

As the list of factors to be considered increases, the divergence of opinion among the circuits increases, magnifying the need for this Court to provide a clear and concise standard to guide the lower courts in considering this important constitutional issue.

CONCLUSION

For the reasons stated, Petitioner prays this Court issue a Writ of Certiorari.

Respectfully submitted,
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Appendix

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 80-5176

United States of America,

Appellee,

v.

JESUS JIMENEZ-DIAZ and
CARLOS HUMBERTO SALAZAR,

Appellant

Appeals from the United States District Court for the Middle District of Florida. Ben J. Krentzman, District Judge.

Decided October 19, 1981.

Before TJOFLAT, FAY, and VANCE, Circuit Judges.

Anthony F. Gonzalez, Richard A. Lazzara, for Appellant Jesus Jimenez-Diaz;

Roy E. Black for Appellant Carlos Humberto Salazar; Manuel Menendez, Jr. and Judy S. Rice, Assistant United States Attorneys for Appellee.

TJOFLAT, Circuit Judge:

Jesus Jimenez-Diaz and Carlos Salazar were convicted in the district court on a multi-count indictment charging the violation of several federal drug laws. They appeal, claiming that the trial judge committed reversible error in questioning a codefendant in the presence of the jury about his plea of guilty to one of the charges for which Jimenez-Diaz and Salazar were on trial. Salazar claims, in addition, that the trial judge erred in denying his pre-trial motion for a continuance and in admitting in evidence a post-arrest statement Salazar made to the police, and that the cumulative effect of these and other errors was to deny him a fair trial. None of appellants' claims has merit, and we therefore affirm their convictions. We note, however, that the district court in sentencing each appellant on count three of the indictment, the conspiracy charge, imposed a term of special parole. The Supreme Court, in *Bifulco v. United States*, 447 U.S. 381, 400, 100 S.Ct. 2247, 2259, 65 L.Ed.2d 205 (1980), has determined that special parole is not authorized by the conspiracy statute; therefore, upon receipt of our mandate, the district court shall strike the special parole term from appellants' sentences.

I

James Hudson, the codefendant, pleaded guilty to count three of the indictment, which charged him, Jimenez-Diaz and Salazar with conspiring to import and to possess 384 pounds of cocaine with intent to distribute it. He subsequently received a grant of immunity and testified as a prosecution witness against Salazar and Jimenez-Diaz. Hudson provided the jury with a complete scenario of the cocaine smuggling operation that resulted in the

indictment. According to Hudson, he met Salazar and a man named John on October 13, 1979, at an airport in Alberton, Georgia; the three men boarded a Cessna 414, and John flew it to an island in the Bahamas. There John left the group, and Hudson took over the controls and flew the plane to a remote airstrip in Colombia, South America. Upon landing, Hudson and Salazar were met by several men, including Jimenez-Diaz, who refueled the airplane and loaded it with several pieces of luggage. Salazar, who spoke Spanish, directed these operations; Hudson neither spoke nor understood the language. When the plane was ready to depart, Salazar told Hudson that Jimenez-Diaz would accompany them on the return trip to the United States. Hudson protested; he felt the added weight of another passenger would make the takeoff too risky. Hudson relented, however, when Salazar explained that Jimenez-Diaz had to accompany the cargo.

Hudson flew the Cessna to Tampa, Floirda, arriving in the early morning hours of October 14, 1979. When it landed at Tampa International Airport, the aircraft was seized by agents of the Drug Enforcement Administration and U.S. Customs, and its cargo of luggage was searched. The agents found 384 pounds of cocaine in the luggage; in a small purse they found Jimenez-Diaz's identification papers and the keys to the luggage, most of which had been locked. The agents read Hudson, Salazar and Jimenez-Diaz their *Miranda* rights (the latter two were given their rights in Spanish as well as English) and questioned them separately. Salazar made the only incriminating statement relevant to this appeal; if the agents could get him out of jail, he said, he would "do something better" for them in two weeks.

II

On the prosecutor's direct examination Hudson readily admitted his involvement in the smuggling activity; the prosecutor did not ask him, however, about his plea of guilty to the conspiracy charge or the circumstances that led to his being given immunity. Counsel for Jimenez-Diaz opened the cross-examination and, like the prosecutor, chose not to inquire about Hudson's plea or immunity. Counsel's questioning was brief. First, he got Hudson to deny that he ever conspired with Jimenez-Diaz. Then, he established that Jimenez-Diaz did not comprehend English and that Hudson was, therefore, unable to communicate with him. Finally, he planted the seed for his closing argument to the jury—that Hudson was smuggling an alien, Jimenez-Diaz—by getting Hudson to admit that he had previously smuggled aliens from Colombia to the United States.

Salazar's lawyer took a different approach. He focused on Hudson's credibility, attempting to establish that Hudson, not the defendants on trial, was the smuggler. His questioning created the impression that Hudson had bought his freedom by agreeing to testify for the government against Jimenez-Diaz and Salazar. The court, during a sidebar conference, admonished counsel for creating the impression that Hudson had gone "scot-free." The court told counsel that the jury was being misled and that the court would bring out Hudson's plea of guilty if counsel did not. Neither defense counsel voiced any objection to the admission of Hudson's guilty plea under the circumstances; they suggested, however, that the prosecutor, not the court, should be the one to develop the point.

Following this sidebar conference, Salazar's attorney continued on his tack that Hudson had managed to escape prosecution. He questioned Hudson about his post-arrest appearance before the magistrate; Hudson, in attempting to be responsive, volunteered that he had also appeared before the district court. At this point, the court intervened:

> THE COURT: All right. I think at this time to clarify the record, the witness having first twice referred to having been before me and it appearing that he is—was named as a defendant in this case, Mr. Witness, are you talking about the occasion of January 11th, that is a week ago today, when you appeared in this Court and pled guilty to the offense charged in Count Three of this indictment?
>
> THE WITNESS: Right. Right, sir.

Record, vol. III, at 208-209.

Salazar's attorney, resuming his cross-examination, established that Hudson was testifying under a grant of immunity. The court then addressed the jury:

> THE COURT: Now, ladies and gentlemen, [the grant of immunity] involves a question of Law and I will instruct you about that.
>
> As the witness has testified, the record indicates that the witness pled guilty to the offense charged in Count Three of the indictment in this case on January 11th, 1980, a week ago today.

* * * * * *

You are entitled to consider all of that in weighing the weight and credibility to be given the testimony of Mr. Hudson. That is to say you are entitled to consider everything that you have heard him say on direct and cross examination.

You are entitled to consider the fact that he has pled guilty to an offense charged in this Court. You are entitled to give consideration to the testimony he gave about the other events in which he has been involved and you are entitled to—to know that he testified—is testifying here today, after having been granted immunity from his testimony ever being used against him in some other Court.

Id., at 211-214.

The appellants claim that two reversible errors were committed during this sequence of events: First, the court erred in admitting the evidence of Hudson's guilty plea because "its probative value [was] substantially outweighed by the danger of unfair prejudice," Fed.R.Evid. 403; second, the court should not have upsurped the prosecutor's prerogative and questioned Hudson concerning the plea. We find no merit in these claims.

The fact that Hudson pleaded guilty to the conspiracy charge, and was testifying under a grant of immunity, was plainly relevant to Hudson's credibility; the only issue facing the trial judge was, therefore, whether, on

balance, the prejudicial effect of this evidence required the court to exclude it. It may be that defense counsel waived any objection they might have had when, at the sidebar conference while Hudson was on the stand, they seemed to concede the admissibility of the guilty plea by suggesting that it would be more appropriate for the prosecutor, rather than the trial judge, to introduce it. Later, after the court intervened and the plea was exposed, counsel did object on rule 403 grounds, and the government does not now contend that this objection was untimely. Under the circumstances, we will give counsel the benefit of the doubt and consider the issue.

[1] To determine the admissibility of Hudson's plea we look to *United States v. King*, 505 F.2d 602, 608 (5th Cir. 1974), for guidance. There we set forth the factors to be considered in deciding whether evidence of a guilty plea of a codefendant was erroneously admitted. They are:

> the presence or absence of a limiting instruction; whether there was a proper purpose in introducing the conviction or guilty plea of the codefendant; whether the plea or conviction was improperly emphasized or used as substantive evidence of guilt; whether the alleged error was invited by defense counsel; whether an objection was entered or an instruction requested; whether the failure to object could have been the result of tactical considerations; and whether, in light of all the evidence, the error was harmless beyond a reasonable doubt.

United States v. Miranda, 593 F.2d 590, 594 (5th Cir. 1979). Applying these factors, we conclude that Hudson's guilty plea was admissible.

[2] First, we observe that defense counsel themselves invited the court to intervene as it did. During the sidebar conference that immediately preceded this intervention, Salazar's attorney indicated that he was going to persist in his efforts to create the impression that Hudson was perjuring himself to escape prosecution; Jimenez-Diaz's attorney urged him on. Both attorneys knew this strategy would prompt the court to clear the air. When the court subsequently acted, its sole purpose was to remove the utter confusion defense counsel had created regarding Hudson's status as a potential prosecution target and to eliminate any notion that he had gone scot-free. The manner in which the court corrected the record on this point and instructed the jury as to how it was to treat the evidence of Hudson's plea did not, in our view, render the evidence so prejudicial as to require its exclusion under rule 403. We also note that the prosecutor made no impermissible use of the plea in his closing summation to the jury; he simply used the evidence as part of his argument that Hudson's testimony was worthy of belief and should be accorded significant weight. In sum, it was not error for the jury to learn of Hudson's true status under the law.

We turn next to appellants' contention that it was beyond the province of the court to elicit the evidence of Hudson's guilty plea. Fed.R.Evid. 614(b) authorizes a trial judge to "interrogate witnesses, whether called by [himself] or by a party." We recently expounded on this authority in these words:

"Following our common law heritage, a judge is not a mere moderator, and he has an obligation and duty to question witnesses and comment on the evidence when necessary. [citations omitted]. In fact a trial judge may elicit facts not yet adduced or clarify those previously presented and he may maintain the pace of the trial by int[illegible]ng and curtailing counsel's examin[illegible] matter of discretion. *Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979); *United States v. Hill*, 496 F.2d 201, 202 (5th Cir. 1974); *Kyle v. United States*, 402 F.2d 443, 444 (5th Cir. 1968).

Only when the judge's conduct strays from neutrality is a defendant thereby denied a fair trial as required by the Constitution. *See United States v. Middlebrooks*, 618 F.2d 273, 277 (5th Cir. 1980); *United States v. Daniels*, 572 F.2d 535, 541 (5th Cir. 1978)."

United States v. Bartlett, 633 F.2d 1184, 1188 (5th Cir. 1981), *cert. denied*, 50 U.S. L.W. 3225 (U.S. Oct. 6, 1981) (No. 80-1799).

[3] In this case, the trial judge did not stray from neutrality when he questioned Hudson. Rather, his interrogation was a proper response to a trial strategy that doubtless left the jury confused. Far from becoming an advocate, the judge merely attempted to eliminate confusion and, in our view, his action was essential to a fair presentation of the case.

III

A.

Salazar claims that he was denied a fair trial when the district judge denied his attorney's request to postpone the trial. The case was originally scheduled for trial on January 14, 1980. On that day, Salazar appeared and told the court he was dissatisfied with his privately retained counsel. He explained that he had not known until he arrived at the courthouse that morning that he was to be tried that day; he thought he was there for a "hearing." He also said that he had had only a single ten-minute interview with his attorney about the case. The court was satisfied that Salazar had not contrived to force delay and gave him until 1:30 that afternoon to hire a new lawyer.

Salazar found one, and the court continued the trial for three days. It ordered Salazar's first lawyer to confer with the new attorney and to be present in the courtroom for consultation with the defense during the trial. The court also ordered the prosecutor to give counsel the full benefit of the discovery orders previously entered in the case; consequently, counsel had access to the proof the government planned to introduce at trial. Counsel also conferred at length with the attorneys representing Jimenez-Diaz. Despite this, Salazar moved for a further postponement of the trial. His motion was denied.

[4] A motion for a continuance falls within the sound discretion of the trial court, and its denial of such a motion should not be disturbed absent abuse of discretion. *United States v. Cross*, 638 F.2d 1375, 1378

(5th Cir. 1981); *United States v. Houde*, 596 F.2d 696, 701 (5th Cir.), *cert. denied*, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979); *United States v. Siegel*, 587 F.2d 721 (1979). To establish abuse of discretion, the appellant must show that the denial of the motion seriously prejudiced him. *United States v. Cross*, 638 F.2d at 1378; *United States v. Houde* 596 F.2d at 701; *United States v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975).

[5] Although we recognize that Salazar's substitute counsel had a short time to prepare for trial, counsel, in urging the trial judge to grant a postponement, failed to point out how the early trial date would prejudice his client at trial. Counsel proceeded to represent Salazar quite vigorously; he cross-examined each government witness, made appropriate objections and provided an imaginative and thorough closing argument. We are unable to discern any prejudice. Salazar claims none in his briefs and pointed to none during the oral argument of his appeal.[1] There is no basis to conclude that the district court abused its discretion in denying Salazar's motion for a continuance.

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[1]Salazar's counsel conceded in argument that no defense witnesses would have been called. Counsel did say that he would have examined Hudson regarding two previous arrests for smuggling contraband aboard his airplane; on each occasion Hudson accused the passengers of transporting the substances without his knowledge. The record reveals, however, that counsel questioned Hudson regarding these very instances, using transcripts of Hudson's testimony at his bail hearing to refresh his memory. Record, vol III at 184-185; 198-201.

B.

Salazar claims that the district court erred in refusing to suppress his post-arrest statement to the federal agents that he could do something better for them in two weeks if they let him out of jail. Record, vol. II at 240-241, vol. IV at 180. Salazar contends that the statement was involuntary and, moreover, that it was part of a plea negotiation cognizable under Fed.R. Crim.P. 11.

Salazar was interviewed itermittently by several agents while he was detained at the Tampa International Airport following his arrest. He admits that when the first interview began, the agents asked for his cooperation but plainly told him that they could not guarantee anything. Record, vol. II at 239-240. His argument is that the agents who conducted the subsequent interviews failed to disclaim any ability to make promises; *a fortiori*, the agents obtained his statement either involuntarily or in a Rule 11 plea negotiation.

Salazar concedes that an investigating agent's promise to make the accused's cooperation known to the prosecuting attorney coupled with a disclaimer that the agent can make no binding promise is an insufficient inducement to render the accused's statement involuntary. Brief of Appellant Salazar at 43. *See United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978), *United States v. Frazier*, 434 F.2d 994, 996 (5th Cir. 1970). Salazar argues, however, that the interrogator must make a disclaimer each time he attempts to gain information from the accused. Because the agents failed to make a disclaimer immediately prior to taking his incriminating statement, Salazar asserts that the statement was

rendered involuntary. *See Bram v. United States*, 168 U.S. 532, 543, 18S.Ct. 183, 187, 42 L.Ed. 568 (1897).

[6] The district court found that Salazar knew, when he made his statement, that the agents could not promise anything and that his statement was made voluntarily after a full administration of his *Miranda* rights in Spanish and English. Record, vol. II at 267-269. We must accept these findings as true because we cannot say that they are clearly erroneous. *United States v. Turner*, 628 F.2d 461, 465 (5th Cir. 1980).

[7] As for Salazar's contention that his statement was part of a plea negotiation and therefore inadmissable under Fed.R. Crim.P. 11 and Fed.R.Evid. 410, we note that these rules apply only to statements made in the course of plea negotiations, i.e., " 'discussions [that take place] in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.' " *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978) *quoting*, ABA Project on Minimum Standards for Criminal Justice of Pleas of Guilty, Introduction at 3 (Approved Draft 1968). Salazar was not contemplating a plea to criminal charges; he simply wanted his freedom. True, Salazar was seeking a deal, but the deal did not involve a plea. *United States v. Robertson*, 582 F.2d at 1365-68.

C.

Salazar's final claim is that he was denied a fair trial. He contends that five errors combined to produce this result.

We have disposed of the first two, the court's denial of Salazar's motion for a continuance and its interrogation of Hudson concerning his guilty plea, finding them to lack merit. We thus turn to the three remaining claims of error; they also lack merit, standing alone and in combination.

[8, 9] During the jury selection, the trial judge conducted the *voir dire*. Salazar faults the judge's dismissal of two prospective jurors, who were sympathetic to Salazar, and his refusal to excuse two others whom Salazar challenged for cause. The first two jurors said they could not serve fairly and impartially; their disqualification, therefore, cannot seriously be questioned. *United States v. Delval*, 600 F.2d 1098, 1101 (5th Cir. 1979). Those whom Salazar challenged for cause had been exposed to pretrial publicity, but the judge refused to dismiss them because he was satisfied that they could lay aside their impressions and opinions and render a verdict based on evidence presented in court. *United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978). *See Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1960). The court acted well within its discretion in accepting these jurors.

[10] Salazar claims that the court improperly limited his right to cross-examine Hudson. We have reviewed each instance Salazar has cited and find no signs of prejudice. *United States v. Bartlett*, 633 F.2d at 1188.

[11] Salazar's final objection is that the court repeatedly interrupted his closing argument, thereby limiting its effectiveness. The court interrupted Salazar's lawyer twice. When counsel implied that one of the government agents had been improperly allowed to sit

in the courtroom, the court informed the jury of the government's right as a matter of law to have an agent present during the proceedings. When counsel voiced his personal opinion about an agent's conduct, the court simply cautioned him, quite appropriately to confine his argument to conclusions he wished the jury to draw from the evidence. *See United States v. Rodriguez*, 585 F.2d 1234, 1243 (5th Cir. 1978), *cert denied sub nom. Albernaz v. United States*, ____ U.S. ____, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). In both instances, the court acted within its discretion. *See United States v. Breedlove*, 576 F.2d 57 (5th Cir. 1978).

The convictions of the appellants are AFFIRMED; the district court, on receipt of this mandate, is instructed to strike the special parole term incoporated in the sentence imposed on count three of the indictment.

AFFIRMED, with instructions.

APPENDIX B

United States Court of Appeals for the Fifth Circuit.

No. 80-5176

Carlos Humberto Salazar,

Appellant

v.

United States of America,

Appellee

ON PETITION FOR REHEARING

Before TJOFLAT, FAY, and VANCE, Circuit Judges.
PER CURIUM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Entered for the Court:

(Filed Nov. 30, 1981) _____